IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. EDWARD PATRICK VASQUEZ, Petitioner.	)	2 CA-CR 2007-0039-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20031874

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Alex Heveri
Tucson
Attorneys for Petitioner

V Á S Q U E Z, Judge.

¶1 Following a jury trial, petitioner Edward Patrick Vasquez was convicted of three nondangerous, nonrepetitive, class four felonies: aggravated driving with a blood alcohol concentration (BAC) of .08 or more with a suspended license, aggravated driving under the influence of an intoxicant (DUI) with two or more prior DUI convictions, and

aggravated driving with a BAC of .08 or more with two or more prior DUI convictions. The trial court suspended imposition of sentence and placed Vasquez on five years' probation, conditioned on his serving four months in prison. We affirmed his convictions and sentences on appeal. *State v. Vasquez*, No. 2 CA-CR 2004-0022 (memorandum decision filed Jan. 28, 2005).

¶2 Vasquez then filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In the petition that followed, Vasquez contended his trial counsel had rendered ineffective assistance by "failing to present relevant and exculpatory evidence at the motion to suppress hearing" and thereby failing to preserve for appeal the issue whether the deputy sheriff who stopped Vasquez's vehicle had had a sufficient legal basis for stopping him. The trial court held an evidentiary hearing on Vasquez's claims and then denied relief, giving rise to the present petition for review. We review a trial court's grant or denial of post-conviction relief for an abuse of discretion, *see State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find no clear abuse here.

¶3 One of the four witnesses to testify at the pretrial hearing on Vasquez's motion to suppress evidence was the arresting officer, a sheriff's deputy who had been assigned to a DUI unit at the time. He testified he had been in a turn bay on Valencia Road near Tucson Boulevard, facing east and preparing to make a U-turn, when he first saw Vasquez's vehicle emerging from a private driveway on the north side of the road and

turning right to go west on Valencia. Vasquez testified at the hearing that the driveway was that of the bar he was just leaving, a fact the deputy did not mention.[1]

¶4 The deputy completed his U-turn and followed Vasquez for a distance he estimated as slightly more than half a mile before deciding to initiate a traffic stop. After the deputy activated his patrol car's lights and siren, Vasquez turned north onto Campbell Avenue and then turned left, into the parking lot of a convenience store located on the west side of Campbell.

¶5 The deputy testified he believed the posted speed limit on that part of Valencia Road was either forty-five or fifty miles per hour. When he first began following and pacing Vasquez's vehicle, it was traveling at a speed of twenty miles per hour. Although Vasquez's speed subsequently increased somewhat, the deputy testified it had never exceeded thirty-five to thirty-seven miles per hour. The deputy testified he decided to stop Vasquez's

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[1]In his petition for review, Vasquez argues:

> It was disingenuous for [the deputy] to report Vasquez's exit from a "private driveway" as if [the deputy] did not know he was exiting a bar. The exhibits show that this bar is the only building on that stretch of Valencia Road.
>
> . . . .
>
> After reviewing the [video]tape [of Vasquez as he drove] and comparing this evidence, which is unrefutable, to [the deputy's] testimony, no other conclusion can be drawn but that [the deputy] immediately stopped Vasquez on a hunch that he would be DUI solely because he drove out from the bar.

vehicle because it was traveling below the speed limit and impeding other traffic, which "w[as] getting caught behind" Vasquez, and because Vasquez had at some point driven "on the white fog line" at the edge of his lane of travel.

¶6 Defense counsel proved at the suppression hearing that, in fact, there had been no white fog line on Valencia Road when Vasquez was arrested in December 2002, and she challenged the arresting deputy's credibility in other ways as well. But, at the conclusion of the hearing, the trial court found the state had proven the existence of reasonable suspicion for the traffic stop, notwithstanding the questions raised about the deputy's credibility, and thus denied the motion to suppress.

¶7 At trial, Vasquez introduced evidence that the speed limit on Valencia Road between Tucson Boulevard and Campbell Avenue was actually forty miles per hour, not forty-five or fifty. The posted speed limit was pertinent primarily because of the deputy's testimony about certain guidelines published by the National Highway Traffic Safety Administration. The guidelines identify twenty or more driving "cues" or mistakes that may indicate a driver is impaired. One such cue, the deputy testified, is driving more than ten miles per hour below the posted speed limit.

¶8 Thus, in his petition for post-conviction relief, Vasquez based his claim of ineffectiveness primarily on trial counsel's failure to have ascertained before the suppression hearing the actual posted speed limit on Valencia Road, which he characterized as "a critical

issue" at the hearing.[2] Although counsel had sent a defense investigator to the scene before the hearing to determine whether there was a fog line on the road, she had not asked the investigator to determine the posted speed limit or to "investigate the scene thoroughly." As a result, counsel later testified at the Rule 32 evidentiary hearing, she had been inadequately prepared to cross-examine the deputy and to rebut his stated reasons for having stopped Vasquez's vehicle.

¶9 The trial court found Vasquez had failed to satisfy either part of the two-part test for ineffective assistance of counsel. "To state a colorable claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below objectively reasonable standards and the deficient performance prejudiced the defendant." *State v. Febles*, 210 Ariz. 589, ¶ 18, 115 P.3d 629, 635 (App. 2005); *see also Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). In its detailed minute entry denying post-conviction relief, the trial court found Vasquez had "fail[ed] to demonstrate adequately how Counsel's actions fell below prevailing professional norms." It rejected as

[2]In the petition for review, Vasquez asserts, mistakenly: "The most critical fact is that [the arresting deputy] based his stop of Vasquez solely [on] driving 10 mph under the speed limit, which is a N[ational] H[ighway] T[raffic] S[afety] A[dministration] DUI cue." In fact, as we stated in our memorandum decision on Vasquez's appeal, the deputy had "a particular, objective basis to stop Vasquez for violating A.R.S. § 28-704(A). That statute provides: 'A person shall not drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic . . . .'" The trial court made a similar observation in its minute entry ruling on the post-conviction petition, stating: "[E]vidence presented at the suppression hearing shows that Petitioner . . . drove below the speed limit and impeded traffic flow, conduct violating A.R.S. § 28-704(A)."

insufficient for that purpose trial counsel's affidavit stating she had failed to conduct sufficient investigation and had thus been inadequately prepared for the suppression hearing.

¶10 Instead, the court reviewed trial counsel's performance at the suppression hearing in depth and observed:

> Counsel's decision to emphasize only certain factors relating to the reasonableness of the stop (i.e., the deputy's internal affairs complaints regarding purported pretextual stops, the short distance spent trailing Petitioner's car, and the like . . .) is evident. The record demonstrates a clear strategy on Counsel's part. Trial strategy is not to be viewed with the benefit of hindsight. Counsel's actions at the evidentiary hearing demonstrate that she prepared for all of these issues. . . . Counsel's regrets about her performance are not alone indicative of ineffective performance. Mere failure to predict all relevant issues does not constitute ineffective assistance of counsel. Counsel clearly followed a strategy in attacking the arresting officer's credibility and sought to use, *inter alia*, the deputy's internal affairs complaints and his own inconsistencies to do that. Indeed, Petitioner admits that Counsel's actions 'focus[ed] on discrediting the officer's basis for a stop.' Clearly, Counsel prepared herself on this topic along with other strategic points that she thought were germane. Her preparation on these points demonstrates under an objective standard that Counsel pursued a clear, cognizable strategy at the suppression hearing (albeit an unsuccessful one).

(Citations omitted.)

¶11 We cannot say the trial court abused its discretion in finding Vasquez had failed "to establish a colorable claim that Counsel's performance fell below prevailing professional norms." Apart from trial counsel's own affidavit, Vasquez supplied no extrinsic

evidence or other support for his contention that counsel's preparation for and performance at the evidentiary hearing on the motion to suppress fell below an objective standard for defense counsel under the circumstances. The record supports the trial court's conclusion.

¶12 The trial court further found Vasquez had failed to demonstrate actual prejudice. Indeed, the court noted, even after the defense had presented at trial the additional evidence Vasquez claims counsel should have marshaled before the suppression hearing, the trial court still ratified its earlier denial of the motion to suppress. *See generally State v. Eggers*, 2 CA-CR 2005-0320, n.6, 2007 WL 1880711, *8 (Ariz. June 29, 2007). Deeming the additional evidence "relevant to witness impeachment or credibility," the court nonetheless found the deputy had had reasonable suspicion to stop Vasquez's vehicle, based on his having committed a traffic violation. In short, the court ruled, even had Vasquez been able to show deficient performance by counsel, the additional evidence would not have persuaded the court to grant the motion to suppress.

¶13 Finding no abuse of the trial court's discretion, we grant the petition for review but deny relief.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PETER J. ECKERSTROM, Presiding Judge